

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL SYLVESTER FRIERSON,

Defendant-Appellant.

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UNPUBLISHED

September 11, 2003

No. 239697

Kent Circuit Court

LC No. 00-001650

Before: Cooper, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a) (victim between thirteen and sixteen and defendant at least five years older), for which he was sentenced to fifteen months' probation. We affirm.

Defendant raises three evidentiary issues on appeal. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Defendant first argues that the trial court erred in admitting an audiotape and enhanced audiotape with transcriptions of a conversation between complainant and defendant. "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it was more probable than not that the error was outcome determinative." *Lukity, supra* at 495-496.

In the conversation, recorded by the Grand Rapids police, complainant tried to discuss the incident with defendant. The recording was mostly inaudible. At the hearing on defendant's motion for new trial, the trial court conceded that the audiotapes and transcriptions were erroneously admitted. We agree. But errors requiring reversal in jury trials do not necessarily mandate reversal in bench trials. *People v Butler*, 193 Mich App 63, 66; 483 NW2d 430 (1992). The trial court is presumed to possess an understanding of the law that allows it to recognize the difference between admissible and inadmissible evidence. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). At the new trial motion hearing, the trial court stated that it did not rely on the audiotapes and transcriptions in finding defendant guilty and its findings of fact support this. Therefore, we find the admission was not outcome determinative.

Defendant also argues the trial court erred in allowing the prosecution to read into the record a statement complainant wrote shortly after the alleged incident. We disagree.

The trial court permitted the statement to be read into the record under the recorded recollection exception to the hearsay rule, MRE 803(5):

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party. [See also *People v Davies*, 192 Mich App 658, 667-668; 482 NW2d 176 (1992).]

Defendant does not dispute that complainant once had knowledge of the incident or that complainant's recorded recollection was properly signed and acknowledged. Defendant argues only that complainant had sufficient memory to testify about the incident. But on certain details of the incident, the prosecution failed to refresh complainant's memory with the document. Complainant testified that she remembered the incident better when she wrote the statement, and could not remember many of the details at trial. Indeed, two years had elapsed between the incident and the trial. We find the trial court did not abuse its discretion in allowing the statement to be read into the record.

Finally, defendant argues that the trial court erred in allowing inadmissible hearsay testimony of three witnesses.

At trial, defendant objected to the testimony of one witness, but did not renew the objection after the prosecution rephrased its questions. Defendant failed to raise any objection to the other two witnesses' testimony. Defendant also failed to raise this issue in his motion for new trial. "As a general rule, issues not raised before and considered by the trial court are not properly preserved for appellate review." *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Unpreserved issues are forfeited unless the defendant demonstrates plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

All three witnesses testified that complainant made statements about defendant to them and those statements caused them concern. They also testified about what they did in response to complainant's statements, and complainant's demeanor when she made the statements. "Where a witness testifies that a statement was made, rather than about the truth of the statement itself, the testimony is not hearsay." *People v Harris*, 201 Mich App 147, 150-151; 505 NW2d 889 (1993); see also *People v Fisher*, 220 Mich App 133, 152-154; 537 NW2d 577 (1996). Testimony about complainant's demeanor was also not hearsay because complainant's demeanor was non-assertive conduct and not a statement for hearsay purposes. *People v Davis*, 139 Mich App 811, 813; 363 NW2d 35 (1984). Defendant has not averted forfeiture of this issue by demonstrating plain error.

Affirmed.

/s/ Jessica R. Cooper  
/s/ E. Thomas Fitzgerald  
/s/ Kirsten Frank Kelly